

1 HONORABLE RONALD B. LEIGHTON  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 HENRY G LUKEN III,

11 Plaintiff,

v.

12 CHRISTENSEN GROUP  
13 INCORPORATED, et al.,

Defendant.

CASE NO. C16-5214RBL

ORDER ON MOTIONS FOR  
RECONSIDERATION AND FOR  
LEAVE TO AMEND

[Dkt. #s 75, 76, 80]

14 THIS MATTER is before the Court on Plaintiff Luken's Motion for Reconsideration  
15 [Dkt. #75] of the Court's Order [Dkt. #74] dismissing his<sup>1</sup> "breach of fiduciary duty" claims,  
16 based on a newly-discovered statute (RCW 88.02.770) that he claims requires boat dealers to  
17 hold customer deposits "in trust." Also before<sup>2</sup> the Court is Luken's related Motion to Amend his  
18 Complaint [Dkt. #76]. Luken seeks to add a claim under this statute, and to add 2 new parties  
19 and 13 other new claims. He seeks to add Christensen Shipyards LLC as a plaintiff, asserting  
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22 <sup>1</sup> Luken asserts parallel claims on behalf of another CSL customer, Indian Marine, which has apparently assigned its  
23 claims to him. The Court's rulings in this Order apply to both sets of claims.  
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<sup>2</sup> Defendant Christensen Group also filed a "Motion to Join" in the other Defendants' opposition [Dkt. #80] to the  
Motion for Reconsideration. That Motion is GRANTED.

1 claims related to its predecessor's (CSL)'s lease from Defendant CGI. Adding CSLLC as a  
2 plaintiff would destroy this court's diversity jurisdiction.

3 The Defendants oppose reconsideration on (and amendment to add) the statutory  
4 fiduciary duty claim. They argue that the statute is not applicable—Luken was an owner and  
5 member of the Board, not a regular “customer,” and he did not make a cash deposit—and that  
6 Luken’s effort to revive his fiduciary duty claim based on a newly-discovered statute is time-  
7 barred and futile. They also oppose the amendment to add Christensen Shipyards, LLC’s new  
8 claims, because the case was filed more than a year ago and the deadline for adding parties  
9 passed last fall. The trial is scheduled for February 16, 2018. They claim that discovery and  
10 motions practice has been ongoing—*eight terabytes* of data has already been produced—and that  
11 they will be prejudiced if Luken is permitted to now add parties and claims requiring them to  
12 start anew. They also argue that the newly-named parties and the newly- asserted claims would  
13 be futile.

14 Motions for Reconsideration are disfavored, and will ordinarily be denied absent a  
15 showing of manifest error, or a new factual or legal basis which could not have been raised  
16 earlier. Local Rule 7(h).

17 Leave to amend a complaint under Fed. R. Civ. P. 15(a) “shall be freely given when  
18 justice so requires.” *Carvalho v. Equifax Info. Services, LLC*, 629 F.3d 876, 892 (9th Cir. 2010)  
19 (citing *Forman v. Davis*, 371 U.S. 178, 182 (1962)). This policy is “to be applied with extreme  
20 liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003)  
21 (citations omitted). In determining whether to grant leave under Rule 15, courts consider five  
22 factors: “bad faith, undue delay, prejudice to the opposing party, futility of amendment, and  
23 whether the plaintiff has previously amended the complaint.” *United States v. Corinthian*

1      *Colleges*, 655 F.3d 984, 995 (9th Cir. 2011) (emphasis added). Among these factors, prejudice to  
2 the opposing party carries the greatest weight. *Eminence Capital*, 316 F.3d at 1052.

3           A proposed amendment is futile “if no set of facts can be proved under the amendment to  
4 the pleadings that would constitute a valid and sufficient claim or defense.” *Gaskill v. Travelers*  
5 *Ins. Co.*, No. 11-cv-05847-RJB, 2012 WL 1605221, at \*2 (W.D. Wash. May 8, 2012) (citing  
6 *Sweeney v. Ada County, Idaho*, 119 F.3d 1385, 1393 (9th Cir.1997)).

7           The Motion for Reconsideration of the Order dismissing the fiduciary duty claims is  
8 **GRANTED** to the limited extent that Luken will be permitted to assert such a claim based on  
9 RCW 88.02.070. The other fiduciary duty claims remain dismissed. Defendants may attack the  
10 viability of this claim through motions practice.

11          Luken’s related Motion to Amend his complaint to add this state law claim is also  
12 **GRANTED**.

13          Luken’s Motion to Amend to add CSLLC (or to allow it to “intervene”) as a plaintiff,  
14 nine months after the deadline for doing so, and where adding CSLLC would destroy this court’s  
15 diversity jurisdiction, is **DENIED**.

16          Luken’s Motion to Amend to add a rescission/reformation claim, seeking to unwind  
17 Luken’s 2003 stock purchase from non-party (and now-defunct) CSL [the Second Claim for  
18 relief in Lukens’ proposed second amended complaint] is also **DENIED**.

19          Defendants argue that permitting Luken to assert other new claims—a claim based on a  
20 2001 guaranty, and a sort of equitable subordination claim—would be futile. They argue, for  
21 example, the guaranty at issue was not intended to apply as broadly as Luken now claims, and  
22 that the subordination claim is really an affirmative defense to a counterclaim. These arguments  
23 may ultimately be correct. But they are summary judgment-type arguments; the claims are not  
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1 facially so deficient that the Court can say it would be futile to add them now. The Motion to  
2 Amend to assert these additional claims is **GRANTED**.

3 The proposed second amended complaint asserts a variety of additional claims, but the  
4 Defendants' Response does not specifically address them (other than to argue that all are too late  
5 and prejudicial). Leave to amend to assert these "un-discussed" claims is **GRANTED**.

6 Luken should file a second amended complaint consistent with this Order within 10 days.  
7 Leave for any additional amendments is unlikely. The Court will entertain a motion for relief  
8 from pending deadlines based on the new complaint.

9 | IT IS SO ORDERED.

Dated this 15<sup>th</sup> day of June, 2017.

Ronald B. Leighton  
Ronald B. Leighton  
United States District Judge